

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

October 17, 2001 Session

FRANCES POWERS v. MARK POWERS TERRY, ET AL.

Appeal from the Chancery Court for Roane County
No. 13,724 Frank V. Williams, III, Chancellor

FILED NOVEMBER 29, 2001

No. E2001-00108-COA-R3-CV

This litigation focuses on a dispute between the former wife of the late James Spencer Terry – a pharmacist – and the parties’ children. Following Mr. Terry’s death, his former spouse sued the children, claiming that she was the beneficial owner of Union Drug Co., a drugstore in Harriman. She based her claim on the language of the parties’ marital dissolution agreement (“MDA”). Following a bench trial, the court below found that, prior to his death, Mr. Terry had sold the drugstore and that the children, as his heirs at law, were entitled to the proceeds from the sale. The trial court also found the plaintiff did not have a legal interest in the drugstore’s bank account and certificates of deposit. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

M. Robin Repass, Knoxville, Tennessee, for the appellant, Frances Powers.

Robert H. Green, Knoxville, Tennessee, for the appellees, Mark Powers Terry and Elizabeth T. Smith, individually and as the co-executors of the Estate of James Spencer Terry, D.Ph., Estate of James Spencer Terry, D.Ph., Union Drug Store of Harriman, Inc., and Union Drug Company.

OPINION

I.

The plaintiff, Frances Powers (“Wife”), and the decedent, James Spencer Terry (“Husband”), were divorced in 1989 after 32 years of marriage. During the course of their marriage, they operated Union Drug Store in Harriman. The business was incorporated in 1969. While the business was operated under various names – Union Drug Store of Harriman, Inc., Union Drug Store, Inc., Union Drug, Inc., Union Drug Company, Inc., Union Drug Company, and Union Drug Store – all agree

there was only one business entity, which the parties simply referred to as “the drugstore.” Wife and Husband were the sole shareholders and officers of the corporation. In 1987, the corporation was administratively dissolved by the Secretary of State. Despite the dissolution, the parties continued to operate the drugstore. While no longer a corporation, the drugstore continued to file corporate tax returns, in which Husband represented himself to be the sole shareholder of the “corporation.”

The parties’ MDA, which was incorporated by reference into their 1989 judgment of divorce, provides, in pertinent part, as follows:

The drugstore jointly owned by the parties, Union Drug Co., located at 520 Devonia in Harriman, Tennessee, shall be the property of the HUSBAND for life, and he is given the right sell same and retain all proceeds. *If HUSBAND should die prior to selling the drugstore, said drugstore shall revert to the WIFE.*¹

(Capitalization in original) (Emphasis added).

On September 17, 1999, Husband executed an Asset Purchase and Sale Agreement (“the Agreement”), by which he agreed to sell the merchandise inventory and prescription records of Union Drug Co. to Revco Discount Drug Centers, Inc. (“Revco”). The Agreement provides that the purchase price of the merchandise inventory would be determined by a physical inventory on September 23, 1999, and that delivery of the bill of sale and payment of the purchase price would take place no later than seven days following the taking of the inventory.

On the same day Husband executed the Agreement, he transferred the drugstore’s telephone number to Revco, as required by the Agreement, and sent a letter to the United States Drug Enforcement Administration (“DEA”) requesting permission to transfer all controlled substances to Revco. In the letter, he declared his intention to relinquish his license to dispense controlled substances. Husband ceased to operate Union Drug Co. as a going concern on September 22, 1999. The following day, only hours before the commencement of the inventory, Husband died. Revco proceeded with the physical inventory as planned. In October, 1999, the defendant, Elizabeth T. Smith, Husband’s daughter and co-executor² of his estate, signed the bill of sale and Revco tendered a check for \$218,475.34, which was deposited in a Union Planters bank account in the name of Union Drug Company, Inc.

¹In a similarly-worded provision, the MDA awards the parties’ residence to Wife:

The marital home of the parties...shall be the property of the WIFE for life, and she is given the right to sell same and retain all proceeds. If WIFE should die prior to selling the property, said property shall revert to the HUSBAND.

(Capitalization in original). Wife sold the residence prior to her former husband’s death.

²The other co-executor is Husband’s son, the defendant, Mark Powers Terry.

Wife brought this action, claiming she was entitled, pursuant to the MDA, to all of the drugstore's assets, including the Union Planters bank account and two certificates of deposit in the name of Union Drug Company, Inc., as well as the proceeds from the sale to Revco. The defendants filed a motion for summary judgment, alleging that Husband had sold the drugstore prior to his death and therefore the proceeds passed to his estate. Wife opposed the motion, arguing that no sale was consummated prior to Husband's death. The trial court granted the defendants partial summary judgment, holding that the proceeds from the sale to Revco belonged to Husband's estate. The trial court set the case for trial as to the remaining issue of the disposition of the other drugstore assets. The case proceeded to a bench trial, following which the court held that the Union Planters bank account and the certificates of deposit were Husband's property at the time of his death and, as a consequence, had passed to his estate.³ This appeal followed.

II.

We first address the trial court's grant of partial summary judgment to the defendants regarding the disposition of the proceeds from the sale to Revco. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. In considering a motion for summary judgment, courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993). Since our review of the trial court's grant of partial summary judgment involves only a question of law, no presumption of correctness attaches to the trial court's judgment. See *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 44 (Tenn. Ct. App. 1993).

Wife argues that partial summary judgment was not appropriate because, so the argument goes, the transaction between Husband and Revco was not *completed* during Husband's lifetime. Therefore, she argues, Husband "die[d] prior to selling the drugstore" and, under the terms of the MDA, "the drugstore" reverted to her. Wife does not attempt to set aside the transfer of assets to Revco, even though it is her contention that the transfer occurred after Husband's death. Rather, she argues that the proceeds from the sale are the "property of the drugstore and, therefore, should be awarded to her."

Wife first argues that the sale did not occur prior to Husband's death because, according to her, the Agreement between Husband and Revco was merely an option contract. In support of this argument, she cites section 20 of the Agreement, pursuant to which Husband agreed that he would not sell or lease "the Store" to any entity for a period of six months from the date of inventory. Wife, however, misconstrues this section. Reading the Agreement as a whole, a clear distinction is made

³The court further decreed that the remaining assets of the drugstore – specifically, its name and goodwill, metal shelves, rubber mats, two computers, a safe, a telephone, and a fax machine – passed to Wife under the terms of the MDA. This finding has not been challenged by the children on this appeal.

between *contents* of the drugstore – *i.e.*, files, records, and inventory – and “the Store” itself, *i.e.*, the physical *premises* of the business. The purpose of the Agreement was to sell most of the *contents* of the drugstore to Revco. Section 20 is merely collateral to the sale. In it, Husband agreed not to sell or lease the *premises* for six months, for which, incidentally, he received additional consideration. This provision does not render the sale of the contents of the store an option contract. Wife’s first argument is without merit.

Next, Wife contends that the sale to Revco did not occur prior to Husband’s death because, so the argument goes, the time of sale and conveyance was set in the Agreement as the date of the inventory. Wife relies upon the following provision of the Agreement:

Subject to the terms and conditions of this Agreement, on the Date of Inventory (hereinafter defined), Seller shall sell, transfer, assign and convey to Buyer, free and clear of all liens and security interests, the following described assets (“Assets”).

The Agreement was dated and signed on September 17, 1999, five days before Husband died. As of the earlier date, both parties were bound to the sale. The fact that the sale was not carried into effect until a later date does not change the fact that Husband was legally bound to go forward with the sale *as of September 17, 1999*. We find that the sale occurred on September 17, 1999.

Wife insists that the Agreement does not amount to a sale of Union Drug Co. as such a transaction was contemplated by the MDA. We disagree.

We begin with the language of the MDA. What did the parties mean by the language “if Husband should die prior to *selling the drugstore*”? (Emphasis added). The answer to this question will resolve this particular issue.

A marital dissolution agreement is interpreted like any other contract. *See Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998). Our goal is to ascertain the intent of the parties according to the usual, natural, and ordinary meaning of the words used by the parties. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). In determining the parties’ intent, a court “does not attempt to ascertain the parties’ state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written.” *Rainey v. Stansell*, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992).

Our inquiry, however, is complicated by the peculiar facts of this case. Although at first blush the phrase “selling the drugstore” appears unambiguous, a latent ambiguity arises when we attempt to apply that language to the facts before us. As stated by the Supreme Court:

A latent ambiguity is where the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the

words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby then will fairly comport with the ordinary or legal sense of the words and phrases made use of.

Teague v. Sowder, 121 Tenn. 132, 148, 114 S.W. 484, 488 (1908). A latent ambiguity in a contract may be removed by the use of parol evidence. *Ward v. Berry & Associates, Inc.*, 614 S.W.2d 372, 374 (Tenn. Ct. App. 1981).

“The drugstore,” as it was commonly referred to by the parties, was for most of the parties’ marriage a corporate entity, with Husband and Wife as shareholders. In 1987, however, the corporation was administratively dissolved by the State, the result of which was that the property which had formerly belonged to the corporation passed to its shareholders. See *Jesse A. Bland Co. v. Knox Concrete Products, Inc.*, 207 Tenn. 206, 211, 212, 338 S.W.2d 605, 607, 608 (1960). Thus, while the parties continued to treat the business as if it were a corporation, it was, in fact, a partnership. The business underwent another fundamental change in 1989 when the parties divorced, and Husband was awarded the drugstore, leaving Wife no interest in the business, at least during Husband’s lifetime. Husband became the sole proprietor of the business. Thereafter, “the drugstore” was simply James Spencer Terry, a proprietorship, doing business as Union Drug Co.

The significance of these changes in the structure of the business – from corporation to partnership to proprietorship – becomes evident when we attempt to interpret what the parties meant by “selling the drugstore.” If “the drugstore” were a corporation, the meaning of the phrase “selling the drugstore” is relatively clear: generally speaking, one sells a corporation by selling its stock. However, as we have just discussed, the business entity at issue was *not* a corporation at the time the MDA was executed; it was a partnership, and after the MDA, it was a sole proprietorship and continued to be so right up to the time of the sale to Revco.

Thus, the question is simply this: What qualifies as a sale of a business when it is a sole proprietorship? In the instant case, there were numerous components to Husband’s business: the name, the goodwill, the equipment, the bank account, the certificates of deposit, the pharmacy records, and the inventory, pharmaceutical and otherwise. As we have already held, Husband sold the pharmacy records and the inventory of the drugstore prior to his death. While these assets were only part of what made up Husband’s business, the facts demonstrate that their sale, especially when considered in the context of the Agreement, resulted in the termination of the functioning business entity of James Spencer Terry doing business as Union Drug Co. These assets represented the essence of Husband’s business; they are assets without which the drugstore could not have continued to operate as a retail business. In addition to selling the drugstore’s inventory and records, Husband notified the DEA that he was transferring the drugstore’s controlled substances to Revco and that he was surrendering his license to deal in such substances. He also transferred to Revco the drugstore’s phone number. Finally, on September 22, 1999, he closed the drugstore’s doors for the last time. When he died on September 23, 1999, the Union Drug Store was simply gone; *there was*

no ongoing drugstore business. He had done everything required of him under the Agreement to transfer the core assets of the drugstore to Revco. All that remained to be accomplished was the physical inventory of the merchandise so that the purchase price could be calculated and a bill of sale exchanged. Based upon these circumstances, we find that Husband “[sold] the drugstore” prior to his death within the meaning of the MDA. Therefore, the proceeds of the sale would have belonged to Husband had he lived, and they belong to his estate – and hence his heirs – by virtue of his death.

Our determination that Husband sold the drugstore during his life also resolves the issue of the disposition of the bank account and certificates of deposit that were held in the drugstore’s name. Because Husband “[sold] the drugstore” before his death, the reversionary language of the subject provision of the Agreement is not implicated. Therefore, Wife is not entitled to the other assets at issue, *i.e.*, the bank account and certificates of deposit. These assets and the proceeds from the sale passed to Husband’s estate.

III.

The judgment of the trial court is affirmed. This case is remanded for collection of costs assessed below. Costs on appeal are taxed to the appellant, Frances Powers.

CHARLES D. SUSANO, JR., JUDGE